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CITATIONS

450684—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 985

OWENS-ILLINOIS GLASS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The majority of the court below rendered no opinion. The dissenting opinion (R. 1544–1573) is reported in 123 F. (2d) 670. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 106–187) are reported in 25 N. L. R. B. 92.

JURISDICTION

The decree of the court below (R. 1543) was entered on December 2, 1941. The petition for a

writ of certiorari was filed on February 28, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's cease and desist order is unduly broad in light of the Board's findings.

2. Whether the Board's findings that petitioner discriminatorily laid off nine of its employees, discharged two others, and refused to reemploy four of the eleven, are supported by substantial evidence, and, if so, whether the Board properly ordered petitioner to offer reinstatement to the employees whom it had refused to reemploy.[1]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 18–19.

STATEMENT

Upon the usual proceedings, the Board on July 5, 1940, issued its findings of fact, conclusions of law, and order (R. 106–187). The pertinent facts,

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[1] In view of the Board's consent to modification of the "work relief" provision of the back-pay portion of the order to conform to the decision in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, the question of the validity of that provision is not in issue. See *infra*, pp. 11–12.

as found by the Board and shown by the evidence, may be summarized as follows:[2]

Shortly after Federation of Flat Glass Workers of America (herein called the Union) began to organize petitioner's employees in July 1937 (R. 114–115, 116; R. 263–265, 1451–1453), various supervisory employees of petitioner, including particularly Brand, who was superintendent of the packing department, sought to discourage membership in the Union by disparaging it and its leaders, questioning employees with regard to it, advising them not to join, telling them that membership would not benefit them and would be futile, threatening that membership might result in loss of their jobs and removal of the plant, and suggesting that the men abandon the Union and form "their own" organization (R. 116–118, 120–122, 123–128, 150; R. 374–375, 393–394, 418–423, 432–434, 506–507, 508–511, 515–519, 521–524, 540–550, 582, 616–617, 635–637, 696–697, 724–727, 804–806, 951, 956–958, 1288–1290). Brand instructed his shift foremen and other subordinates to keep Union meetings and members under surveillance and report to him. They did so and Brand kept a record of employees in his department who were members of the Union and active in its behalf. (R. 118–120; R. 824–829, 839–846,

[2] In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

919–920.) In September 1937 he reinstated a discriminatorily laid off employee in order to use him as an informer (R. 127–128, 150; R. 954–958, 919–920, 1456). Personnel Director Cassedy offered another discriminatorily discharged employee reinstatement if he would agree to engage in espionage activities and refrain from testifying at a Board hearing (R. 126–127; R. 305–306, 309). The Board found that petitioner, by the foregoing statements and activities of its supervisory employees, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7, thereby violating Section 8 (1) of the Act (R. 118, 120, 123, 125, 127, 128).

The Board found further (R. 128–155) that petitioner violated Section 8 (3) and (1) in that on September 17, 1937, during a business decline, acting through Brand, it discriminatorily laid off nine packing department employees and thereafter discriminatorily refused to reinstate three of them (Anselene, Gallion, and Balseto).[3]

Prior to the lay-offs, when Brand had instructed his shift foremen to keep union members and meetings under surveillance, he had told them that "there was some cleaning up to be done" (R. 118, 131; R. 827). Each of the nine employees had joined the Union and afterwards been singled

[3] The others (Stemple, Tennant, Henderson, Laratta, Lewis, and Schnell) were subsequently recalled (R. 140, 142, 147, 150, 153, 155).

out by Brand or subordinate supervisors for threats, warnings, reprimands, or other comment with respect to union activities (Anselene: R. 133; R. 693–700; Gallion: R. 136; R. 803–806; Stemple: R. 139; R. 790–792; Tennant: R. 141; R. 765–766, 770–771, 782–783; Balseto: R. 142–143; R. 720–726; Henderson: R. 146; R. 615–617; Laratta: R. 147–148; R. 949–951; Lewis: R. 151–152; R. 580–584, 603–605; Schnell: R. 154; R. 635–637, 642, 852). And about a month before the lay-offs, Brand had changed the assignments of each of the nine employees in question, except Gallion, in order to facilitate laying them off under the guise of reasons other than their union membership and activities. Thus, contrary to usual plant practice and for no apparent business reason, they were assigned to positions which were certain to be discontinued due to the anticipated shut-down of a furnace (R. 129–131, 133, 139, 141, 143, 146, 148, 151, 152, 154; R. 848–850, 584, 595–598, 614–615, 635, 700–701, 726–729, 776, 789, 794, 953, 1059–1060, 1086, 1088–1090, 1510).[4] One of the shift foremen testified that a few days before the lay-offs, Brand gave him a list of union members who were to be

[4] Brand told a foreman that the reason for the transfers of three of the employees on his shift (Anselene, Laratta, and Schnell) was because they were union members (R. 129–131; R. 849–850), and two foremen in effect told another of the employees involved (Balseto) that his transfer presaged a dismissal for union activities (R. 143; R. 726–727).

dismissed, including four of the nine later laid off (Anselene, Gallion, Laratta, and Schnell) (R. 131; R. 853–854). Brand instructed him to provide reasons other than "because they were C. I. O.'s" to justify their selection for lay-off, and later, dissatisfied with the reasons suggested, collaborated with him in preparing memoranda containing "adequate" reasons (R. 131–132; R. 848–849, 853–859, 1459–1465).

At the hearing petitioner advanced various reasons to explain its action in selecting the employees in question for lay-off and in refusing thereafter to recall Anselene, Gallion, and Balseto. Upon a careful analysis of these reasons and of the evidence adduced in their support, the Board concluded that they were not the true ones (R. 132–155). The pertinent evidence is set forth in the Board's decision (*id.*) and only that bearing upon the case of Gallion need here be mentioned, since the petition does not attack the Board's findings as to the others by reference to any specific evidence.

The principal reason (Pet. 18) advanced by petitioner for laying off and refusing to reinstate Gallion is that she was undependable and had been absent from work on numerous days during the months prior to her lay-off. While there was proof that the latter was true, the Board was unpersuaded by it (R. 136–138) in view of evidence that she had been employed by petitioner longer

than 144 of the 184 women in her department (R. 1525); that her foreman had called her into his office on the day after she had joined the Union and advised her to leave the Union alone (R. 803–806); that Brand had included her on the list which he gave the foreman with instructions to prepare reasons, other than union membership or activity, for laying off the employees named (*supra* pp. 5–6); and that when at first the foreman submitted "laying off too much" as the reason to be used in her case, Brand was dissatisfied with it and asked for additional reasons (R. 853–854, 858, 1459, 1463, 1464).

In addition to its other findings, the Board also found (R. 169, 172–175, 176–180) that petitioner discriminatorily discharged employees Daugherty and Shaffer, and thereafter refused to reemploy Daugherty, in violation of Section 8 (3) and (1) of the Act. Daugherty, a versatile employee of long service (R. 169; R. 408–412), was one of the most active union members in petitioner's plant; he joined the Union as a charter member and became treasurer and later president of the local (R. 169; R. 418, 1452). He had been singled out by Superintendent Burchett of his department and by a foreman for special warning and comment concerning his union activities (R. 169; R. 418–420, 432–434). He was discharged in September 1938 when the personnel of his department was reduced from 60 to 24 (R. 172; R. 1536–1541,

1306); however, while the others were merely laid off and all but 2 of them were subsequently recalled,[5] Daugherty was discharged and never considered for reemployment thereafter (R. 172–174; R. 1394–1396, 1536–1541).[6]

The reasons advanced by petitioner for discharging and not recalling Daugherty were that he had become "embittered and antagonistic toward the Company and all its representatives" (R. 1394–1396), and that he consistently refused to attend departmental meetings (R. 1396–1398). The only evidence that Daugherty was embittered and antagonistic was an alleged report which the plant manager claimed to have received from a foreman to the effect that some six months earlier Daugherty, referring to his belief that he had been previously discriminated against by petitioner, characterized the foreman and petitioner as "dirty" (R. 173, 174; R. 1396, 464–465). Attendance at the departmental meetings was entirely voluntary (R. 174–175; R. 1397, 1411) and so far as the record shows no effort was ever made

[5] Specific reasons for not rehiring these two employees were later entered on their service records (R. 174, note 61; Hoffman: R. 1537, and Heckman: R. 1538); no such entry appears on Daugherty's record (*Ibid.*; R. 1538).

[6] Petitioner's assertion (Pet. 12–13) that in March 1939 its general manager considered rehiring Daugherty but decided not to do so finds no support in the record and is contrary to the Board's findings, which are based upon the testimony of the plant manager himself (R. 174; R. 1394–1396).

to persuade Daugherty that he ought to attend them (R. 175, 1410). His personnel record bore no notation of the asserted grounds for his discharge (R. 175; R. 1538, R. Exh. 65, R. 1468).

Shaffer, who also worked in Superintendent Burchett's department (R. 176; R. 281, 282), was among the first to join the Union. He did so on July 7, 1937, and immediately became active in its behalf; he discussed the Union with fellow employees and solicited members in his department (R. 176; R. 288, 291–292). He was discharged on July 14, 1937, allegedly for reckless driving of his tractor (R. 176–177; R. 293–297, 1190). He was a less satisfactory driver than others and had operated his tractor negligently a few days before his dismissal (R. 176–177; R. 1106–1110, 1140–1142, 1171–1172, 1177–1178, 1186–1189). But the Board concluded that these asserted reasons were not the true ones which led to his discharge (R. 179–180). Four days before his discharge, Burchett had warned him that "if you don't keep your damn mouth shut * * * about the C. I. O. you are not going to have no job" (R. 176; R. 291). Shaffer's foreman later sent to Burchett a note which referred to Shaffer's union activities in the department and which immediately prompted the dismissal (R. 177–178).[7] Petitioner's plant

[7] The evidence was conflicting concerning the contents of the note, which is not in evidence (R. 178–179). The Board credited the testimony of Daugherty, who was then working as gang leader under Burchett, to the effect that Burchett

manager subsequently admitted that Burchett's action "might have been hasty" (R. 179; R. 302–304, 387–392, 480–483), and petitioner's personnel director offered to effect Shaffer's reinstatement if he would engage in union espionage activities and would refrain from testifying at the Board hearing (R. 179; R. 304–306, 309).

Upon the foregoing findings the Board ordered petitioner (1) to cease and desist from discouraging union membership of its employees by discrimination in regard to hire and tenure or any terms or conditions of employment, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) to reinstate the four discriminated

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showed him the note, that it stated that Shaffer had "done an awful lot of talking, but I haven't seen him pull out any cards to get signed," and that Burchett at the same time expressed the fear that the Union would blame him for Shaffer's discharge but that if he had not dismissed Shaffer, the foreman would have reported to the plant manager that Shaffer was organizing Burchett's department (R. 430–431). The foreman's testimony in this regard was highly evasive and contradictory (R. 1111, 1118–1119). Burchett denied that the note related to union activities but was not questioned concerning the conversation with Daugherty about the note (R. 1190).

against employees who had been refused reemployment; (3) to make whole with back pay all employees discriminated against, deducting and paying over to appropriate governmental agencies amounts earned by the employees on work-relief projects; and (4) to post appropriate notices (R. 185–187). The Board dismissed the complaint as to 20 other employees alleged to have been discriminated against by petitioner (R. 187).

On July 15, 1940, petitioner filed in the court below a petition to review and set aside the Board's order (R. 188–199); the Board answered, requesting enforcement (R. 200–205). On October 8, 1941, the court entered a decree (R. 1543) enforcing the Board's order in full. Judge Simon and Judge Allen, comprising the majority, rendered no opinion. Judge Hamilton dissented in an opinion in which he stated that the majority was of the view that the rules announced in *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 209, and other decisions of this Court required enforcement of the Board's order (R. 1573).

ARGUMENT

1. Petitioner contends (Pet. 7–8) first that the "work relief" provision of the back-pay portion of the Board's order is invalid under the subsequent decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board,* 311

U. S. 7. This was conceded by the Board in the court below, and in its brief (p. 42, n. 30) the Board consented to modification of its order to conform to the *Republic Steel* decision. The failure of the court below to make the modification no doubt was inadvertent; it was not referred to in the dissenting opinion. In any event, since the Board has consented to the modification and since this consent is and will remain effective, there is no occasion for review.

2. Petitioner's second contention (Pet. 9–11) is that the cease and desist provisions of the Board's order, quoted in the footnote,[8] are too broad in that there is no basis in the record or findings for those portions which require petitioner to cease and desist from discouraging union membership of its employees by discriminating in regard to "any terms or conditions of employment," and from interfering with, restraining, or coercing its

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[8] "1. Cease and desist from:

"(a) Discouraging membership in Federation of Flat Glass Workers of America, or any other labor organization of its employees, by discriminating in regard to their hire and tenure of employment or any terms or conditions of employment.

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act."

employees in the exercise of their right "* * * to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." It is urged that the violations enjoined in these portions bear no resemblance to the acts which petitioner was found to have committed and that no danger of such violations in the future is to be anticipated from petitioner's course of conduct in the past, hence that the provisions are invalid under the principles enunciated by this Court in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 437.

However, as appears from the Statement (*supra*, pp. 3–10), the Board's findings, supported by substantial evidence, reveal that petitioner engaged in a varied assortment of acts of interference, restraint, and coercion designed to discourage membership in and to frustrate ultimate bargaining through the Union. These illegal acts included discriminatory changes in position, layoffs, discharges, threats of removal of the plant, advice to abandon the Union and to form another organization, and declarations that membership in the Union would not benefit the employees and would be futile. Petitioner's violations thus were far more numerous and varied than the refusal to bargain involved in the *Express Publishing* case. They were of the same type

covered by the cease and desist provisions.[9] Moreover, they were so numerous and varied and were committed with such open hostility to the Union as to furnish ample basis to believe that other violations might occur unless enjoined. Accordingly, the test of the *Express Publishing* case is doubly met here and enforcement of the cease and desist provisions as written was proper. Similar provisions were enforced in *National Labor Relations Board* v. *Automotive Maintenance Mach. Co.*, decided February 16, 1942, No. 188, this Term.

3. Petitioner assails (Pet. 11–14) the reinstatement provision of the Board's order as violative of its normal right to hire and fire. It alleges that its plant manager considered reinstating the four employees (Anselene, Gallion, Balseto, and Daugherty) covered by the provision and for reasons independent of their union membership and activity decided that they should not be rehired.

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[9] While the complaint did not allege and the Board did not find that petitioner violated Section 8 (5) of the Act, the portion of the order requiring petitioner to cease and desist from interfering with, restraining, or coercing employees in the exercise of their right to engage in collective bargaining is amply justified, since petitioner's acts of discrimination and interference, including the statements of its supervisors that membership in the Union would not benefit the employees and would be futile, had the ultimate design of preventing the Union from obtaining majority status and indicated that petitioner might not bargain with the Union even if it did obtain such status.

There is no evidence that Daugherty was considered for reinstatement (note 6, p. 8, *supra*) and the Board found (R. 136, 138, 145) that the three other employees were refused reinstatement for the same discriminatory reasons which had prompted petitioner to lay them off, rather than for the reasons assigned by petitioner at the hearing, which were substantially identical with those advanced by it as motivating the lay-offs. These findings are amply supported by the evidence detailed in the Board's decision (R. 133–138, 142–145). Moreover, even if the opposite were true, the reinstatement provision would be a valid exercise of the Board's power under Section 10 (c) to remedy the effects of petitioner's illegal discrimination in laying off the employees. *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 348; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 187–188. Contrary to petitioner's claim (Pet. 14), the provision does not insure permanent tenure to the employees or purport to immunize them from dismissal after reinstatement for causes other than those proscribed by the Act.

4. Finally, petitioner contends (Pet. 15–21) that there is a lack of substantial evidence to support the Board's findings and order in many respects and that the holding of the majority of the court below to the contrary reflects a misapprehension of the true meaning of the decisions of this Court

with respect to the proper scope of judicial review under the Act. This misapprehension, it asserts (Pet. 16), is shared by other circuit courts of appeals which have allegedly upheld Board findings as conclusive without ascertaining whether they were supported by substantial evidence as distinct from "anything which has the appearance of evidence."

The evidence in this case hereinbefore summarized (pp. 3–10) is clearly substantial judged by the criteria repeatedly declared and applied by this Court. The petition contains no reference to any of the testimony pertinent to any of the unfair labor practices found by the Board except the lay-off of Gallion and the discharge of Shaffer, and its discussion of the evidence with respect to those instances ignores and is refuted by the proof cited in the Statement (*supra,* pp 4–7, 9–10). The majority judges rendered no opinion and the dissenting opinion contains not a word of justification for petitioner's suggestions (Pet. 15, 16, 17) that the judges, misconceiving their duty under the Act and the decisions of this Court, failed to examine the record to ascertain whether the Board's findings were based on substantial evidence. In answer to the charge that other circuit courts of appeals have been acting under similar misconceptions, it is sufficient to note that petitioner cites no instance.

CONCLUSION

The judgment of the court below is correct. There is no conflict on any disputed issue nor any other ground for review. The petition should, therefore, be denied.

Respectfully submitted.

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